

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NORMAN ALAN KERR,  
  
Petitioner,  
  
v.  
  
WARDEN,  
  
Respondents.

Case No. 2:23-cv-01148-JDP (HC)  
  
ORDER AND FINDINGS AND  
RECOMMENDATIONS

Petitioner, a federal prisoner without counsel, brings this action pursuant to section 2241 and challenges a conviction that was handed down in the Middle District of North Carolina. ECF No. 1 at 1. He brings this section 2241 action alleging both that he is actually innocent and that his enhancement under section 922(g)(1) is invalid. *Id.* at 1; ECF No. 2 at 1-2. I recommend that his petition be denied. I will grant his application to proceed *in forma pauperis*, ECF No. 2, and deny his petition for electronic filing, ECF No. 5 as moot. Finally, petitioner has also filed a motion to amend, ECF No. 6, which, after review, I construe as a motion to expedite and will also deny as moot.

Petitioner argues that he is entitled to proceed under section 2241's "escape hatch" because he is actually innocent. ECF No. 1 at 6. He is incorrect. By way of background, the crux of petitioner's actual innocence claim is that the jury in his conviction case handed down a verdict of not guilty, and the court changed it to a guilty verdict. *Id.* at 1. Challenges to the

1 legality of a federal prisoner's conviction must be brought under section 2255 unless he can show  
2 that such a motion is inadequate or ineffective to test the legality of his detention. 28 U.S.C.  
3 § 2255(e). Under Ninth Circuit precedent, a section 2255 motion is inadequate or ineffective only  
4 where "a petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed  
5 procedural shot at presenting that claim." *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008).  
6 Construed liberally, petitioner's allegation that the court changed his not guilty verdict amounts to  
7 a claim of actual innocence. He has failed to show, however, that he has not had an unobstructed  
8 shot at presenting that claim. Satisfaction of this element requires proof that petitioner never had  
9 an opportunity to raise his claim in either a direct appeal or subsequent section 2255 motion. *Id.*  
10 at 960. In weighing this element, I must consider "(1) whether the legal basis for petitioner's  
11 claim did not arise until after he had exhausted his direct appeal and first § 2255 motion; and  
12 (2) whether the law changed in any way relevant to petitioner's claim after that first § 2255  
13 motion." *Id.* Petitioner's allegations indicate that he should have known about the altered verdict  
14 as soon as it was handed down. And petitioner has not cited any intervening change in law that  
15 would excuse his failure to raise this claim previously. I will recommend this action be  
16 dismissed. This dismissal does not preclude petitioner from filing a section 2255 motion in the  
17 district of conviction.

18 Accordingly, it is ORDERED that:

- 19 1. Petitioner's application to proceed *in forma pauperis*, ECF No. 2, is GRANTED.
- 20 2. Petitioner's petition for electronic filing, ECF No. 5, and motion for leave to amend,  
21 ECF No. 6, are DENIED.
- 22 3. The Clerk of Court is directed to randomly assign a United States District Judge to this  
23 case.

24 Further, it is RECOMMENDED that the petition, ECF No. 1, be DISMISSED without  
25 leave to amend as improperly brought under section 2241.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
3 objections shall be served and filed within fourteen days after service of the objections. The  
4 parties are advised that failure to file objections within the specified time may waive the right to  
5 appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*  
6 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

7  
8 IT IS SO ORDERED.

9 Dated: July 18, 2023

  
10 JEREMY D. PETERSON  
11 UNITED STATES MAGISTRATE JUDGE  
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